Supreme
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No. 88-1956

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1988

STATE OF GEORGIA,

Petitioner,

v.

ROBERT W. ROPER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF FACTS

In lieu of a complete statement of facts, Respondent submits the following corrections of inaccuracies and omissions in the Statement of Facts and in the Reasons for Granting the Writ contained in the Petition for a Writ of Certiorari (hereinafter "Petition"):

Petitioner, on page 3 of the Petition, declares its reliance upon the facts as set forth by the Supreme Court of Georgia in Roper v. State, 258 Ga. 847, 375 S.E.2d 600 (1989). In that Court, the Petitioner conceded that Respondent invoked his right to counsel by completing a form requesting an attorney. Id. at 849. Yet on page 6 of the Petition, the Petitioner now asserts that the form filled out by Respondent did not constitute a sufficient request for counsel. The form indicated that Respondent wanted an attorney to represent him, and no evidence was presented that he limited in any manner his request for counsel. Id. at 850.

Although it is correct that the form in question was provided by the public defender's office (Petition 4), it should not be omitted that the person who supplied Respondent with the form was a special deputy clerk of court performing a service through and for the judiciary. (9/3-16/87 Pre-trial Motions Transcript, pp. 130, 135-136, 138) (hereinafter designated 9/87 MT). It was standard procedure for this individual to instruct an inmate to fill out the form if he desired an attorney. (9/87 MT 135). The form was not specific as to the attorney's purpose. Id. at 137. And the information in the form was provided to the arraigning judge as well as to the public defender's office. Id. at 136.

The extent of Respondent's consultation with an attorney consisted of a meeting in the courtroom whereby a public defender engaged in a brief conversation with Respondent concerning a waiver of extradition. Roper, 258 Ga. at 848. The substantive charges were not discussed other than the public defender advising Respondent to keep his mouth shut. Id. at 848-849.

The application completed by Respondent requesting an attorney became a part of the jail records and was available to the police who interrogated Respondent subsequent to his request for an attorney. (9/87 MT 137). A county prosecutor was aware that Respondent had appeared in court, for the fugitive complaint, with a public defender. Id. at 143-144. Either that same prosecutor, or one other, met with the case detectives later that day, prior to the interrogation which resulted in the reversal of Respondent's convictions. Id. at 76-78.

At trial, a psychologist testified that he was 95 per cent confident that Respondent's I.Q. was somewhere between 68 and 78. (9/16/87 Sentencing Phase Transcript, p. 45). This meant that Respondent was borderline mentally retarded with a mental age of about twelve years. Id.

RESPONSE TO REASONS FOR GRANTING WRIT

I. NO CONFLICT EXISTS BETWEEN THE SUPREME COURT OF GEORGIA AND THE UNITED STATES COURTS OF APPEAL FOR THE FIFTH AND ELEVENTH CIRCUITS WITH REGARD TO THE SCOPE OF THE EDWARDS RULE.

Petitioner contends that a conflict exists between federal courts and the Supreme Court of Georgia as to when police may initiate interrogation following an invocation of the right to counsel and actual consultation with counsel. (Petition 5, 7). Petitioner cites Dunkins v. Thigpen, 854 F.2d 394 (11th Cir. 1988), and Griffin v. Lynaugh, 823 F.2d 856 (5th Cir. 1987), as allowing reinterrogation after an accused has consulted with counsel. Petitioner then requests that this Court resolve the conflict by deciding that police may interrogate an accused, who previously invoked his right to counsel, outside the presence of an attorney so long as a consultation occurred. (Petition 9). However, these cases are readily distinguishable and no such conflict in fact exists.

As a preliminary matter, Respondent never consulted with an attorney concerning the substantive charges. Roper, 258 Ga. at 848. His brief meeting in a courtroom with a public defender concerning extradition, not the substantive charges, cannot be considered a consultation in any meaningful or practical sense. As no consultation occurred, this is not an

appropriate case for deciding the ramifications of an attorney-client consultation on an accused who was continuously in custody.

Secondly, the cases cited by Petitioner deal with aspects of the rule of Edwards v. Arizona, 451 U.S. 477 (1981), that are different than those presented to the Georgia Supreme Court. Griffin concerns a limited request for counsel (which was fully honored) rather than an invocation of the general unlimited right to counsel. In contrast, the Georgia Supreme Court specifically noted the absence of any evidence that Respondent's request for counsel was limited. Roper, 258 Ga. at 851. No right-to-counsel violation occurred in Griffin because the police complied with the accused's limited request. Griffin, 823 F.2d at 857. The sole issue was the meaning to be given an unambiguous limited request for counsel. Id. at 862.

In Dunkins, where the accused asked to speak to either his attorney or his mother, the police did more than merely meet his request - they released him from custody entirely. Not surprisingly, the Eleventh Circuit held that the petitioner's freedom - not consultation with an attorney - rendered the protection of the Edwards rule unnecessary. Dunkins, 854 F.2d at 397. As Respondent was never released from custody, Dunkins does not apply to the case at hand.

Not only does Petitioner assert that there is a conflict between the Georgia Supreme Court and the federal courts, Petitioner also requests that this Court decide what happens when an accused has consulted with an attorney. (Petition 9). It is well settled that an invocation of the right to counsel requires the presence of an attorney during questioning. See, e.g., Edwards, 451 U.S. at 484. The Edwards rule came about as a corollary to the admonition in Miranda v. Arizona, 384 U.S. at 474, that "[i]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present." Arizona v. Roberson, 486 U.S. ____, 108 S.Ct. 2093, 100 L.Ed.2d 704, 712 (1988).

Petitioner is advocating that the police now be allowed to interrogate an accused after he has met with an attorney, even though the accused has remained in custody and has expressed a desire to deal with the police only through counsel. Respondent asks this Court not to ignore the "inherently compelling pressures" of custodial interrogation which was the concern of Edwards, 451 U.S. at 485, and not to overturn Edwards.

II. NO CONFLICT EXISTS BETWEEN THE DECISION OF THE GEORGIA SUPREME COURT AND MICHIGAN V. JACKSON AND MICHIGAN V. DORAN

Previously, Petitioner conceded that Respondent invoked his right to counsel but argued that Respondent's invocation of the right was limited to formal court proceedings. Roper, 258 Ga. at 849-850. The Georgia Supreme Court, addressing this particular argument, noted the lack of evidence that Respondent wished to limit his request for counsel. Id. at 850. The Court cited Michigan v. Jackson, 475 U.S. at 633, which held that a request for counsel is to be given a broad interpretation. Id.

Petitioner now contends, for the first time, that the Edwards rule has no application whatsoever where an accused requests the assistance of counsel in an asylum state which is seeking to initiate extradition proceedings. (Petition 9-10). The rationale is that the Fifth Amendment right arises only in a custodial setting, and the Sixth Amendment right does not attach at an extradition hearing.

Respondent submits that, as this question was never raised in nor passed upon by the Georgia Supreme Court, as required by Supreme Court Rule 21.1 (h), it is inappropriate to grant a writ of certiorari on this ground.

Addressing the issue on the merits, Petitioner is incorrect in arguing, first of all, that no Sixth Amendment

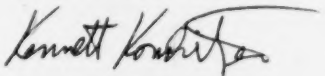
right to the assistance of counsel attaches prior to an extradition hearing due to the summary nature of extradition. The Uniform Criminal Extradition Act provides that one is entitled, in the asylum state, to be informed by a judge of a court of record of the right to the assistance of counsel as well as other rights, such as the right to contest the extradition by writ of habeas corpus. See, e.g., O.C.G.A. 17-13-30. The Fourth Amendment prohibits extradition without evidence that a fair and reliable probable cause determination has occurred in the demanding state. See, e.g., Batton v. Griffin, 240 Ga. 450, 241 S.E. 2d 201 (1978), citing Gerstein v. Pugh, 420 U.S. 103 (1975). The extradition procedure signals "the initiation of adversary judicial proceedings" and consequently the attachment of the Sixth Amendment. See Michigan v. Jackson, 475 U.S. at 629-630.

Additionally, in putting forth this argument, Petitioner is ignoring the directive of Michigan v. Jackson, 475 U.S. at 636, that the assertion of the right to counsel at arraignment "or similar proceeding" triggers the application of the Edwards rule.

CONCLUSION

For all of the reasons stated above, Respondent requests that this Petition for a Writ of Certiorari be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the within and foregoing Response To Petition For A Writ Of Certiorari upon all of the parties who are required to be served, prior to the time of filing, by depositing same in the United States Mail with adequate postage attached, in an envelope addressed to:

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Sworn to and subscribed before me,
this 1st day of September, 1989.

Notary Public, State of Georgia

SUSIE B. KELLEY NOTARY PUBLIC EFFINGHAM CO., GA.